

**AGENDA**  
**REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS**  
**Monday, April 20, 2009, at 9:00 a.m.**  
**Scott Hart Auditorium**  
**303 North Roberts, Helena, MT**

**ACTION ITEMS**

- 409-1     TIMBER SALES:**  
**A. BEAVER CREEK CONGLOMERATE**  
Benefits: Common Schools  
Location: Powder River County  
**(APPROVED 5-0)**  
**B. NO NAME SALVAGE**  
Benefits: Common Schools  
Location: Powell County  
**(APPROVED 5-0)**  
**C. CHICKEN ANTICE**  
Benefits: Common Schools  
Location: Flathead County  
**(APPROVED 4-1, Superintendant Juneau dissenting)**  
**D. WHITE PORCUPINE #1**  
Benefits: Common Schools  
Location: Lake County  
**(APPROVED 4-1, Superintendant Juneau dissenting)**
- 409-2     APPROVAL FOR COMMUNITIZATION AGREEMENT – DEVON ENERGY CORP.**  
Benefits: Common Schools  
Location: Powder River County  
**(APPROVED 5-0)**
- 409-3     PRELIMINARY APPROVAL - DNRC/CS&KT LAND EXCHANGE**  
Benefits: Common Schools  
Location: Lake and Lewis and Clark Counties  
**(APPROVED 5-0)**
- 409-4     SET MINIMUM BIDS FOR LAND BANKING PARCELS:**  
**A. MADISON COUNTY**  
Benefits: Public Buildings and State Industrial School  
Location: Madison County  
**(APPROVED 5-0)**  
**B. SWEET GRASS COUNTY**  
Benefits: Common Schools  
Location: Sweet Grass County  
**(APPROVED 5-0)**
- 409-5     FINAL APPROVAL FOR SALE OF LAND BANKING PARCELS:**  
**A. CHOUTEAU COUNTY**  
Benefits: Public Buildings  
Location: Chouteau County  
**(APPROVED 5-0)**  
**B. HILL COUNTY**  
Benefits: Public Buildings  
Location: Hill County  
**(APPROVED 5-0)**  
**C. TOOLE COUNTY**  
Benefits: Common Schools and Public Buildings

Complete agenda item information can be found on the DNRC's website at:

<http://dnrc.mt.gov/commissions/Default.asp>

*Location: Toole County*

**409-6**

**EASEMENTS:**

**A. RIGHTS-OF-WAY**

Benefits: Common Schools and School of Mines

*Location: Chouteau, Custer, Dawson, Fergus, Gallatin, Garfield, Golden Valley, Madison, McCone, Meagher, Park, Prairie, Richland, Rosebud, Sanders*

**(APPROVED 5-0)**

**B. MCKAY COST SHARE SUPPLEMENT NO. 25**

Benefits: Common Schools

Burdens: Common Schools

*Location: Sanders County*

**(APPROVED 5-0)**

**409-7**

**OTTER CREEK APPRAISAL – SOLICITATION OF PUBLIC COMMENT**

Benefits: Common Schools

*Location: Powder River County*

**(APPROVED 5-0)**

**PUBLIC COMMENT**

Common School Trust Coal Ownership  
Township 3 South, Range 45 East, Sections 26, 34 and 36  
Township 4 South, Range 45 East, Sections 2, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26 and 36  
9,543 acres  
Powder River County  
Common School Trust

### **Action Requested**

The department requests Land Board authorization to distribute and solicit public comment on the Montana Otter Creek State Coal Valuation Report.

### **Brief Background**

The Otter Creek tracts are the end product of the controversy over the proposed Crown Butte Mine. The Crown Butte mine was to be located near Yellowstone Park, but did not involve state trust land. Because of the controversial location, the Federal government bought out the mining rights in order to prevent the operator from obtaining a mining permit from the Montana Department of Environmental Quality. The State of Montana argued this Federal action hurt Montana through loss of jobs and taxes that would have been generated if the mine had been allowed to proceed.

The Federal government subsequently passed legislation that would convey to the State, either \$10 million in cash, the Otter Creek tracts, or other mineral rights agreed to by the State and Federal government. The State chose the Otter Creek tracts. They are located about 10 miles southeast of Ashland, Montana. Otter Creek flows northward through the Otter Creek tracts to its confluence with the Tongue River at Ashland. The Custer National Forest is adjacent to the Otter Creek tracts on both the east and west sides, with the eastern boundary of the Northern Cheyenne Reservation (Tongue River) approximately 10 miles to the west. The Otter Creek project area is currently viewed as containing up to three adjacent areas of potential reserves, which are referred to as “Otter Creek 1,2, and 3.”

The Federal conveyance to the State was approved by the State Land Board on May 20, 2002, and certified by the Governor’s Executive Order No. 12-02 on May 28, 2002. The Federal conveyance includes only mineral estate; no surface ownership was transferred. Pursuant to Article X, Section 2 of the Montana Constitution, these tracts became part of the common (i.e. public, K-12) school trust. Surface ownership is a combination of retained Federal and private ownership. The tracts conveyed to the State total 7,623 acres and are depicted on the attached map in dark blue. The State already possessed some state school trust ownership within the Otter Creek area, which are depicted in lighter blue. This brings the State’s full ownership interest to about 9,543 acres.

Prior to the Federal conveyance of the Otter Creek tracts, the Land Board entered into a February 19, 2002 Settlement Agreement with the Northern Cheyenne Tribe (NCT). The NCT had

threatened to file suit against the Federal government opposing the transfer, unless the State entered into an agreement with NCT. This agreement places certain restrictions on any coal leases that may ultimately be issued by the Land Board.

## **Property Information**

State recoverable coal totals 616 million tons, or about one-half of the total 1.3 billion ton reserve. Of that, 572.3 million tons is unleased. Initial capital investment to develop the property is estimated at \$1.0 billion.

Anticipated coal quality in the Otter Creek area is 8,600 btu/lb, with relatively low sulfur (i.e. “compliance” coal), which is good, but with relatively high sodium content. The higher sodium content limits existing markets to those plants in the upper mid-West that possess boilers and related equipment that can handle high sodium coal. To reach these markets, the mine area would need rail access to the north (the northern portion of proposed Tongue River railroad) to connect it with existing rail-lines at Miles City, Montana. The most favorable route would require construction of approximately 90 miles of railway.

The other potential market would be construction of a coal-fired electrical generating plant (specifically designed to handle Otter Creek coal) near the Otter Creek tracts. In addition to the plant, a significant investment in power line infrastructure would be required.

The State’s ownership, though significant, comprises about one-half of the area – in a checkerboard pattern. Great Northern Properties LP (GNP) – the successor to the original railroad grant to Great Northern Railroad, owns the other half. If a mine is to be developed, it will, by necessity, include both State and GNP coal lands.

## **Previous State/DNRC Activities**

DNRC and GNP previously entered into a Memorandum of Agreement consistent with our common goal. Both the State and GNP are interested in this area being evaluated and potentially developed for energy production, and both understand that commercial development requires the State and GNP properties to be developed together.

The 2003 Legislature passed Senate Bill 409, which identified areas of data acquisition that would be beneficial to prepare a package of tracts for possible leasing. The legislature also included \$300,000 in spending authority for the department to engage in pre-lease data acquisition and evaluation.

DNRC utilized funding authorized by Senate Bill 409 to acquire both coal resource and cultural inventory data. DNRC engaged Kennecott Energy in an exploration process to acquire additional core data and analysis. The drilling program was completed during the 2004 field season, with data delivered to DNRC in October 2004. The primary goals of the drilling and coring program were to develop additional data on sodium and trace elements, and further delineate the extent of the coal resource. Interested coal companies will utilize this data to further assess their interest in the Otter Creek tracts.

DNRC also retained GCM Services Inc., to prepare a cultural inventory of the state tracts. Field work was conducted during June 2004; the final report was received November 2, 2004. This provides DNRC and interested coal companies with initial information regarding cultural resources in the area. This also would provide additional baseline data with which to engage in the actual inventory and/or mitigation process pursuant to the Land Board's February 19, 2002 settlement agreement with the Northern Cheyenne Tribe. This process would trigger when a mine plan was actually proposed.

DNRC obtained all technical data available from the Bureau of Land Management (BLM) on the acquired tracts. This data, along with the newly acquired technical and cultural data has been converted to electronic format. DNRC is able to provide all existing data, reports, documents, etc. to coal companies and interested parties on a CD or via website.

In 2006, DNRC and GNP completed a joint property resource study. This study utilized previously available data, GNP proprietary data, and the new datasets acquired by DNRC in 2004. The result was the most comprehensive analysis yet of the Otter Creek coal reserve.

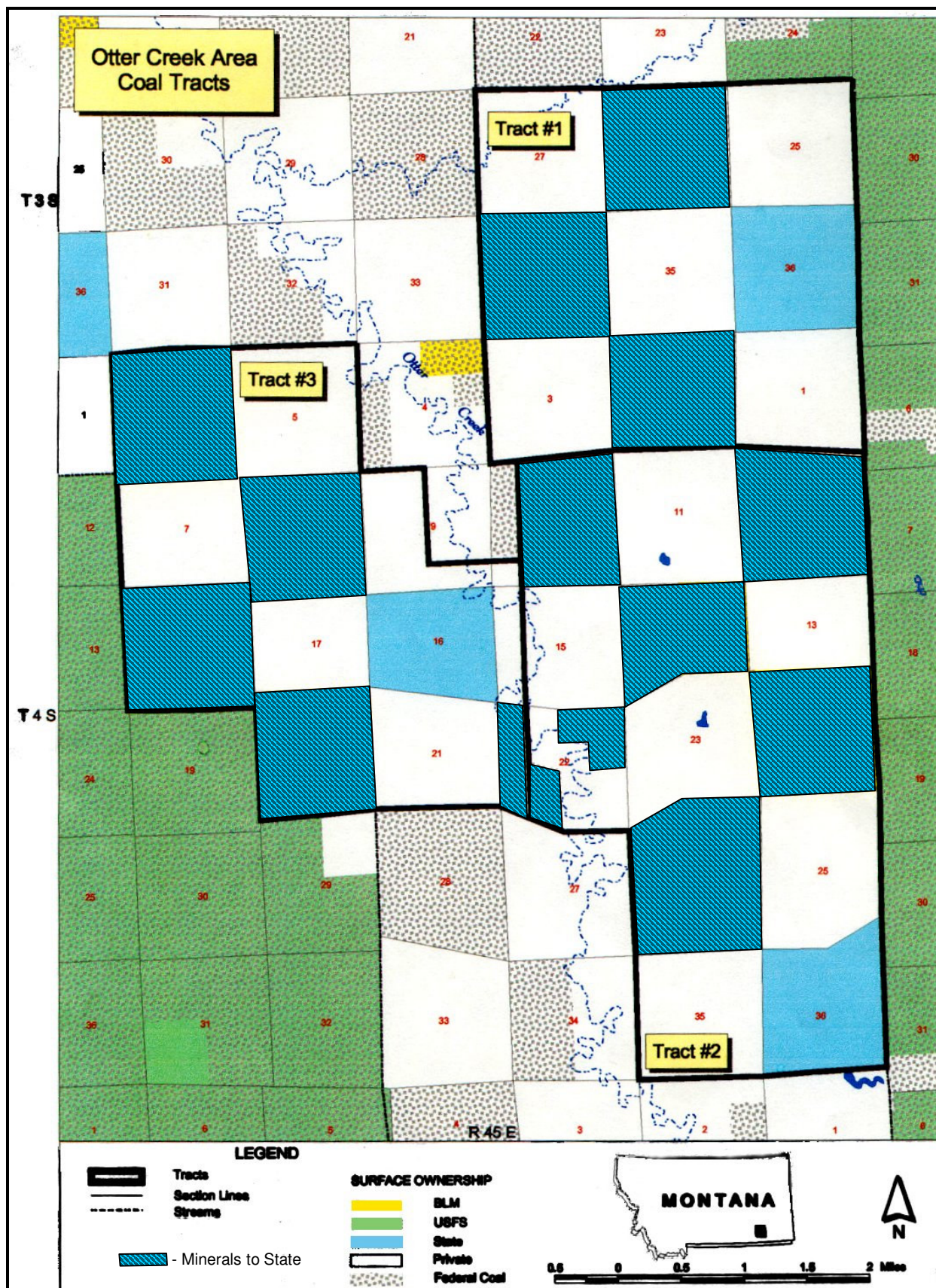
### **Coal Leasing Appraisal**

The recently completed coal leasing appraisal is ready for distribution and solicitation of public comment as required pursuant to 77-3-312, MCA. The appraisal was prepared to determine the fair market value of the state school trust's Otter Creek coal ownership. This appraisal process is required in order to place the coal tracts up for competitive lease bid.

The appraisal was prepared pursuant to Federal Bureau of Land Management Handbook H-3070-1, Economic Evaluation of Coal Properties. The Handbook prescribes the standards and methodologies to be utilized for examination of coal properties for competitive leasing. Two major approaches are available, and both were utilized in the subject appraisal; one, consideration and analysis of comparable sales information, and two, calculation using a net present value analysis model.

The appraisal estimates the school trust could receive as much as \$1.4 billion in royalty payments over a 40 year period, and concludes a minimum up-front bonus bid of between \$0.05 and \$0.07 per recoverable ton represents fair market value. The minimum bid increases to \$0.10 per recoverable ton if independent financing is assumed for construction of the Tongue River Railroad. The total minimum up-front bonus bid would be \$37.3 million at \$0.07 per ton, and \$57.2 million at \$0.10 per ton of recoverable coal.

If the Land Board approves, the department would distribute the appraisal and solicit public comments for review. The department would anticipate returning to the Land Board in June 2009 to review comments received. The issue before the Board at that time would be whether and upon what minimum terms to offer the state's unleased coal property out for bid.





# DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

## Trust Land Management Division



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### OTTER CREEK COAL PROPERTY APPRAISAL REQUEST FOR COMMENTS

April 21, 2009

#### Dear Reader:

The Montana Department of Natural Resources and Conservation appreciates your interest in the development and management of the Otter Creek school trust coal property. The attached appraisal document represents the culmination of a multi-year effort to gather and provide both technical resource and project financial information to the Land Board, interested companies and the public.

Located southeast of the town of Ashland in western Powder River County, the Otter Creek coal property contains over 1.2 billion tons recoverable coal reserves. One half of the reserve is located on what is now Montana school trust land. The other half of the coal reserve is privately owned, with the vast majority held by Great Northern Properties LP. (GNP) The ownership pattern resembles a checkerboard, with GNP and the State owning alternating sections. Both parties must participate for coal to be developed.

The state school trust originally held three sections within the Otter Creek property. However in 2002, a settlement involving the Federal government, the Northern Cheyenne Tribe and the State Land Board completed the transfer of an additional 12½ sections of federally owned coal and mineral rights to Montana's public (i.e. K-12) school educational trust. Revenues generated from management of the public school trust help fund Montana schools statewide.

The department utilized funding from the 2003 Legislature to obtain additional drill and core hole data on the state's Otter Creek ownership. This data was combined with federal and GNP data to produce the 2006 Otter Creek Property Summary Report, the most detailed analysis to date of the total coal resource. The attached appraisal document utilizes technical data from the 2006 property report and develops an estimate of fair market value of the state's ownership. State statute requires the preparation and public review of an appraisal for the Land Board's consideration prior to offering school trust coal properties out for competitive leasing. A coal appraisal serves a specific purpose – it provides the financial terms (bonus bid, rental and royalties) which together represent the full, fair market value of the property that may be offered for lease. An appraisal is not an environmental analysis. If the property were leased by the Land Board, and if the lessee submits a proposed plan for development, a detailed MT-DEQ mine permit review prepared pursuant to MEPA would be required.

This appraisal was completed according to the methods specified in the Bureau of Land Management (BLM) Handbook H-3070-1, *Economic Evaluation of Coal Properties*. The handbook provides two separate methods for determining a coal property's value, and both were utilized in this appraisal.

Appraisal standards require consideration of the costs involved in delivering coal to market. The base appraisal therefore includes the financing cost for a rail line between Otter Creek and Miles City. This produces a minimum bonus bid of \$0.065 per ton. At the department's request, the appraiser also calculated the minimum bonus bid assuming the rail line was separately financed. This increased the minimum bonus bid to \$0.10 per ton. The appraisal yields the following estimated value for the state property that may be considered for lease and development.

Minimum Bonus Payment: \$37.3 million (\$57.2 million if rail line is separately financed)  
Annual Rentals (\$3/acre): \$1.0 million (over 40 years)  
Royalty Payments (12.5%): \$1.4 billion (over 40 years)

Additional information is available on our website at: [http://dnrc.mt.gov/trust/MMB/otter\\_creek](http://dnrc.mt.gov/trust/MMB/otter_creek)

**Please submit comments to me in writing by May 22, 2009:**

Monte Mason, Minerals Management Bureau Chief

By mail: Dept of Natural Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

By fax: 406-444-2684

By email: [mmason@mt.gov](mailto:mmason@mt.gov)

It is anticipated the lease appraisal and comments will be considered by the Land Board at their regularly scheduled June 15, 2009 meeting.



**MINUTES**  
**REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS**  
**Monday, April 20, 2009, at 9:00 a.m.**  
**Scott Hart Auditorium**  
**303 North Roberts, Helena, MT**

*PRESENT: Governor Brian Schweitzer, Attorney General Steve Bullock, Auditor Monica Lindeen, Secretary of State Linda McCulloch, and Superintendent of Public Instruction Denise Juneau*

**Ms. McCulloch moved for approval of the minutes from the March 16, 2009, meeting of the Board of Land Commissioners. Seconded by Ms. Lindeen. Carried unanimously.**

**BUSINESS CONSIDERED**

**409-1      TIMBER SALES:**

**A. BEAVER CREEK CONGLOMERATE**

Ms. Sexton stated this is a 1200 acre sale located in Powder River County with an estimated volume of 1821 MBF and a stumpage value of \$5.09 per ton. Access is being granted through a temporary road use agreement with private landowners.

Loren Rose, Pyramid Mountain Lumber controller, stated that lands are in the worst condition in recorded history due to bark beetles, mountain pine beetle infestation, and other issues. The chaotic housing industry has crippled the timber industry. Everybody in the industry can make with cheaper raw material. Unfortunately, landowners are not very inclined to sell for a lower price.

Mr. Rose stated that Governor Schweitzer understands the forest health problem. He convened the Red Tree symposium in June 2007. Two presenters from Colorado made a very strong statement when they closed. They said: "Do not lose your forest products industry. You cannot lose your infrastructure. There are no mills left in Colorado, and it is costing taxpayers tens of millions of dollars to treat those lands that infested by beetles."

Montana now has the same problem here, although not yet to the same magnitude. Unfortunately there is a forest products industry that is crippled. Two hundred fifty people in Frenchtown are not working this week, a mill in Bonner closed last week, and all the mills are running at about half-capacity. The mills could all make it with cheaper raw material. The Land Board has the unenviable task of balancing what is best for the land with what is best for the schools. The "ace in the hole" is the DNRC's tremendous group of land management professionals. Those people know what the problems and solutions are. Mr. Rose stated that trusting the DNRC experts' recommendations supports the timber industry, and that having a timber infrastructure is the best thing for the state schools over the next two to five years. Without that industry, the school trust land would lose far more than they would lose selling a few timber sales in a low market over the next year or two. If a mill closes down, the state lands are impaired in two ways.

- ♦ for example, there is no mill at Bonner anymore timber sold from state lands south of Missoula, those logs have to go in four directions from Missoula (St. Regis, Pablo, Seeley Lake, or Deer Lodge). It costs landowners a haul rate of \$10 per ton, which comes off of stumpage; and
- ♦ competitively, the state loses advantage at the bid table as more mills close. Currently the mills are fairly evenly dispersed (75 to 100 miles away). Pulling

Ms. Sexton noted that the application for the Gleason Trust includes the caveat that should subdivision occur, a conveyance fee will be assessed.

**Motion made by Ms. Lindeen for approval of right-of-way applications. Seconded by Ms. McCulloch. Carried unanimously.**

**B. MCKAY COST SHARE SUPPLEMENT NO. 25**

Ms. Sexton stated that the DNRC has ongoing cost share agreements with the USFS and other partners. The McKay Creek cost/share agreement grants more land access for the state than for the USFS, with the state owing \$4215 to the federal government.

**Motion made by Mr. Bullock for approval of cost/share agreement. Seconded by Ms. McCulloch. Carried unanimously.**

**409-7      OTTER CREEK APPRAISAL – SOLICITATION OF PUBLIC COMMENT**

Ms. Sexton stated that what we are doing here today is that we are requesting that the purpose of this action item is for the Land Board to authorize distribution and solicitation of public comment on the Otter Creek Coal Valuation Report. This report has been available on the website and there are also copies available for review. And so we are requesting of you that we be authorized to distribute and solicit public comment. Ms. Sexton offered the following background information:

- ♦ Montana acquired the Otter Creek tracts (about 7600 acres) from federal conveyance in May 2002 as part of an agreement between the state and the federal government, given the development or lack thereof of the New World Mine.
- ♦ State ownership in the area was brought to 9600 acres, including full mineral ownership of the Otter Creek tracts.
- ♦ In February 2002 DNRC signed a settlement agreement with the Northern Cheyenne Tribe, regarding the process of the eventual development of these tracts.
- ♦ There is no access at this point in time, but there is the Tongue River Railroad, which has been in discussion for some time, which would be a source of access for the coal if it were developed in this area.
- ♦ The 2003 Legislature granted funding of \$300,000 for data acquisition that did a coal resource and cultural inventory information of the area.
- ♦ In 2006 a joint property resource study with Great Northern Properties (GNP) was completed.
- ♦ A leasing appraisal was completed to find out what the actual value is of our resource here. It was done with two approaches. One was considering comparable sales information. The second was using net present value analysis model.
- ♦ The appraisal report is what the DNRC brings before the Land Board for approval to begin the public comment period.

Governor Schweitzer asked about possible sensitivity to the bonus payment. The bonus payment of ten cents is based on price per ton. If the price were to increase between now and whenever the tracts went up for bid, would the increase in price be a deal-breaking factor in the multi-million dollar sale?

Mr. Mason stated in the case of the Otter Creek tracts, in terms of such a large proposed development, the huge capital investment costs are upwards of one million dollars with large development costs involving capital and operating two brand new mines, plus a

way to get it out from the mines to a market. The calculation using the-income approach, produces a ten cent front end bonus; that is what it adds up to be, based on a reasonable rate of return. Every company has their own benchmarks and their own calculations on what they think it will cost to operate a mine.

As for sensitivity to the bonus payment, if the project is put out for bid and there are no bids, it could be an indicator that the bonus payment is a factor. However, Mr. Mason cautioned the Land Board that the issue is not the amount of money that the company is willing to put up front, but whether they want to commit to a billion dollar investment over the next ten, twenty, thirty, or forty years. So while the bonus payment seems large to the state at present, it is relatively small in the scheme of things in terms of what is going to be spent on the project over the upcoming decades .

Governor Schweitzer stated another concern that he has is that there are a number of ongoing operations in Wyoming that are already operating with rail service and equipment. Otter Creek has the potential of being a competitor, so the Governor wondered how much one of those large companies (there are only four or five currently operating) would pay, as a bonus bid to sterilize the value: if they paid \$30 million or \$40 million for the bonus payment, with the intent of not developing the assets and keeping the coal off the market so that they value of the coal that they are already mining maintains its current value, or even increasing over the years.

Mr. Mason stated that there are two players—GNP and DNRC. GNP is thinking along similar lines as the DNRC. They are in the position of wanting to develop their coal similar to us in terms of a rental and royalty basis, although they probably will not go out for public bid and will probably negotiate with the company instead. GNP is putting in place benchmarks, and DNRC will be putting in place benchmarks within their agreement—whatever form that may take—in terms of what would need to happen sooner in terms of the ten year primary term in order to keep that lease viable. DNRC's plan is to have a ten year primary term. If they take leases, they'll have to do some additional development drilling, put together their mine plan, the baseline, etc. A diligent developer would put a mine plan in front of DEQ within five years.

So, the DNRC has not drafted up specifics yet; those will come once the department moves forward with the bid package. DNRC looking at a window of five years for a plan to be brought to DEQ for review, or the leases would expire. A person who is contemplating spending thirty, fifty, whatever million dollars, that's what they are looking at -- are they willing to pay that much just to hold on to these leases for a few years.

Governor Schweitzer asked if in addition to the bonus payment, DNRC would have the developer repay a small part of the royalty payment on an annual basis during the first ten years? If they were to walk away at the end of ten years they would lose the bonus payment and the pre-paid royalty payment.

Mr. Mason stated that a company would argue that at the point that they have the leases they would like to be putting their money in to the development of the mines. DNRC has stronger leverage as far as automatic termination of a lease, if it has a brightline test—a plan being diligently reviewed by DEQ within a window, within the lease term (less than ten years, with five years as an average). If that window is not met, the lease “goes away”, and the company has bought themselves nothing.

The other thing to keep in mind is differences of opinion as far as whether the Tongue River Railroad is totally good or totally bad in terms of Wyoming, because some of the concern is 1) how to get the coal to market and 2) they also get a route that might help for some of their coal to get to market, so a company that was looking along the lines of

what you are saying, you have to weigh all of that in terms of what they could accomplish by trying to do that. Mr. Mason said that it is unlikely that a company would part with that kind of money based on the requirement of concrete action within five years.

Mr. Bullock asked for an overview of process for the entire Otter Creek project.

Mr. Mason went through the process.

- ♦ Statute requires the contract appraisal be brought before the Land Board. The DNRC believes it is appropriate to go forward and seek public comment on the appraisal, due to the level of public interest.
- ♦ After the comment period, the comments and the DNRC's responses would be brought back before the Land Board.
- ♦ At that point the DNRC would bring a bid package to the board for review (leasing is not required by statute, but left to the discretion of the Land Board).
- ♦ The Land Board would determine whether or not to offer the package for bid.
- ♦ Assuming the Land Board agreed to start the bid process, DNRC would have a sealed bid.
- ♦ The DNRC reserves the right to reject any and all bids on any competitive bid offering. The bid results would be brought back before the Land Board. At that point, the board would review what the appraisal said, what kind of bid package the DNRC put together, and what kind of bids we were received. The board would then decide whether or not to entertain issuing leases on the basis of those bid results.

Mr. Mason said that today is the first of at least three opportunities for the Land Board to take on the Otter Creek issue.

Mr. Bullock asked what terms the Land Board could put in the lease that would significantly impact the value of the bid amount?

Mr. Mason stated that there are three basic components:

- ♦ the royalty;
- ♦ the rental, which is fairly nominal in terms of what a standard lease requires. DNRC usually looks at \$3.00 per acre per year, because that is what the federal government has set up. Then there would be the diligence requirements within the lease, and the ten year primary term; and
- ♦ the third monetary component is the bonus, which is a one time, up front payment. If the lease is not developed, the lessee loses the lease. An income approach, with a net present value analysis, obviously, if you boost one or the other, you affect the other.

DNRC has been in close coordination with GNP. Going royalty rates on coal is almost universal. GNP has looked at it in terms of their ownership, and they're going with 12.5 percent. As far as the going rate as to what DNRC would want to entertain out there (as far as the royalty burden over the long term), DNRC is looking at a trust value analysis at 12.5 percent. That sets what the remaining bonus up front would be (how many cents per ton could you get over and above that royalty rate).

In terms of diligence requirements within the lease, the Land Board could get into monetary terms such as advanced royalties that are non-recoupable. The board could lose the ability to charge ten cents per ton up front because there is more money wrapped up in the use or lose portion within the lease. That would probably cause DNRC to probably rethink what we are looking at.

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The DNRC is currently (in the appraisal) looking at \$3 per acre, upfront bonus with 12.5 percent royalty, and diligence requirements within the lease that are non-monetary, but force some action within the term of the lease much sooner than the ten year primary term. In that case, those kinds of adjustments with a bid package would not affect the monetary calculation.

Mr. Bullock stated that in 2003 there was a coordination agreement between DNRC and GNP. The agreement seemed to read that both parties would lease at the same price; not that GNP would be negotiating its own separate deal. Mr. Bullock asked what changed since 2003?

Mr. Mason responded that GNP has looked at their coal ownership and the level of interest has varied over time. Over the last year and a half, companies have been talking to them and the Governor's Office in terms of considering development of Otter Creek. GNP is in a position to be much more flexible in what they may do. They could lease it out competitively (like DNRC); they could enter in to a negotiated lease arrangement with somebody, where they still have a rental and royalty recoupment of the value of their coal; or they could go into a joint venture where they contribute the coal, put it at risk, and not take a royalty, or perhaps some other arrangement.

In talking with Great Northern Properties, their most likely scenario now is negotiating with someone to enter into leases on their coal. They would get paid the 12.5 percent royalty rate like DNRC. The only difference is that they would not be going through a competitive bid situation. DNRC did its own appraisal analysis to look at the income approach and appraisal process without looking at GNP. However, after the DNRC finished and compared notes with GNP, DNRC believes both parties are in the ballpark of what this coal is worth on a rental/royalty type bonus basis.

Mr. Bullock said that looking at the comparables and the transportation distances, the comparables are eleven cents to ninety-seven cents in the appraisal report. The best comparable would be what GNP was giving. It seems that there was an assumption six years ago that the two parties would be hand in hand and essentially getting the same thing. Mr. Bullock asked what changed?

Mr. Mason stated that even though Otter Creek is a greenfield mine site, theoretically any number of people could come forward to take on this project. However, Mr. Mason stated that the reality is more likely that it will come down to a company or group of companies working together that are willing to put that kind of money into this project. If the DNRC gets bids, it may only get one bid. It could even be a company that GNP has been working with.

The company that is going to bid is going to have to know that they have got answers in terms of what the coal is going to cost, what the railroad is going to cost, what their bargains are going to be. The company would most likely have working arrangements of some kind with Great Northern Properties and Tongue River Railroad in order to be willing to step up with the kind of money to do the mine development itself.

Mr. Bullock asked when the state got rid of the coordination agreement?

Mr. Mason said the agreement still exists. If GNP wanted to do a negotiated lease process they would—under the terms of the agreement—notify the DNRC formally that they are not going out for competitive bid. GNP's focus is very similar to DNRC's in terms of making sure they have the coal in the hands of a company who is going to be selling it. So they would be looking at a company that they feel comfortable with who is serious about diligent development and also has the ability to perform. They have to

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stay concerned and not just have somebody coming in and not knowing what they are getting into. For example, a company that just wants to bid on it to try to hold on to it and see what happens. Or worst case, try and have it not developed,. Mr. Mason believes that from the GNP company viewpoint, they have much more flexibility that way in negotiating with the company or companies who are truly interested in developing Otter Creek.

Ms. Lindeen asked if the potential costs for reclamation bonding were part of the bid package?

Mr. Mason stated that coal mining in Montana is a regulated activity by DEQ, so mine permitting, reclamation bonding, enforcement, and all that comes under that agency. DEQ determines what the bonds need to be, at what point they need to be posted.

In DNRC's income approach appraisal, that cost [reclamation bonding] is included in the estimate so that when DNRC does a net cash flow, that is taken into account

Ms. Juneau asked why the EIS is not done until after the bid has taken place and why the possible environmental impacts are not taken into account until so late in the process?

Mr. Mason stated there is a risk that any coal developer would even take on the property. He reiterated that the DNRC is under the regulatory authority of DEQ, so in order for a MEPA analysis to be conducted, there must be an operator and operating plan, and all the baseline information. Millions of dollars are involved in doing an EIS on a mine. The mineral owner transfers that risk to the lessee when issuing the lease, with the understanding that there is still an involved MEPA process to go through.

Ms. Juneau asked if the lessee would have the opportunity to withdraw after the MEPA analysis were and done, what the responsibilities of the various parties would be at that point?

Mr. Mason stated that if the lessee did not develop, the lease would be cancelled. DNRC would keep the bonus regardless of whether or not development occurred.

Governor Schweitzer stated that this MEPA process is not dissimilar to the way the oil and gas leasing process. Future lessees need to understand the state's environmental rules. The DNRC has spent some money to analyze the Otter Creek tracts to determine the market for the coal (Powder River Basin, sub-bituminous, six percent sodium, mid-8000 BTU).

Mr. Mason responded that for this type of high sodium coal, there is currently the Spring Creek mine (near Decker). Spring Creek was down under 10 million tons for quite some time. Their current goal is 20 million tons per year. Some market studies have been done by external parties that show that the market for high sodium coal is going to rise over the next few years. It could be up to 120 million tons per year, and DNRC would like to capture its part of that. They have been increasing over the last few years. .

Governor Schweitzer asked is there another source of sub-bituminous, Powder River coal of a six percent sodium level besides Spring Creek in the West?

Mr. Mason stated that there is none that he knows of in Montana. Wyoming Power River Basin coal has issues with sulfur.



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Governor Schweitzer stated that he has also heard that there may be stages in the market that there may be some emerging technology that some boilers would be able to use this higher sodium coal in the future. The Governor said there are  $\pm 1.2$  billion tons of this coal, and currently there are less than 20 million tons sold into the market, and that is already being produced by an operating mine (Spring Creek). He asked if there really is a market for this 1.2 billion ton coal since is only 20 million tons that is reaching the market currently? If the state stole the complete market from Spring Creek, that is a 60 year supply (or 20 million ton per year). The Governor asked what assurance there is that there is a market for the quantity of coal that we would be produced at Otter Creek in just one month?

Mr. Mason stated that as a coal owner, DNRC puts that risk onto the bidder. For somebody to bid on this project, they have to be comfortable that there will be a market for this amount of coal over the next forty years. If they are unsure of that, then there would most likely be no bidders, because there is enough risk of whether or not that volume is available for sale.

DNRC is approaching this knowing that there is interest in the overall Otter Creek project area, so it has not devalued the calculation by a risk factor. DNRC's calculations assume that the market is there and the lessee will be able to monetize that and develop Otter Creek.

If the lessee did the kind of development cost review that the DNRC did, that is where they are going to have some assurance that the markets are there and that they can develop and produce and sell the coal. This includes the railroad. DNRC's high range of what is in the appraisal (ten cents per ton) assumes that the railroad is there. It is comparable to always appraising with access in the Land Banking program. DNRC assumes the railroad is there (wherever it goes and whatever the cost, somebody else is footing that cost).

So in a leasing situation, DNRC shifts all of that risk onto the developer. Mr. Mason said that he could not guarantee that there is a market that will be there. There are indications within the DNRC analysis and within some other analyses, that there is an emerging market for high sodium coal. Spring Creek is selling more than they used to sell. But, the coal is valued without risk adjustment, putting all that risk on to a developer, and if they are wrong, they are the ones who will pay the price.

Governor Schweitzer stated that the risk is not all on the developer; however, if the lease were structured with a bonus payment plus a pre-payment of royalties that would place the risk squarely on the developer. So in ten years, from the time that they got the bid, , in addition to the bonus payment, they have paid a substantial quantity of pre-payment of royalties and means that they are in for the long haul, and not just as a speculator.

Mr. Mason stated that with the requirement that concrete things have to be done in five only a serious company would bid. They are going to argue that the money they would put into the advance royalty would be money that is needed for the high capital costs they are using to develop the mines. If a company were to see that despite their best intentions there will not be a railroad built or the markets are not coming together, it [advance royalty] would still not force them to develop the project.

Governor Schweitzer agreed, but said that it would put money in the state's pocket.

Mr. Mason stated that if more money is on the annual payments, then there is less left over for the upfront bonus. It would not be additional money, it would just come in over time instead of upfront.

Governor Schweitzer stated his concern is that there is only one serious bidder, so there would only be a single bid once the bid was opened. Since the Land Board has to answer to the people of Montana for the next fifty years that the board cut the best deal possible for the state of Montana, it is important for the board to cut the best deal it can for the state.

If Otter Creek were put up for bid with no (publicly known) minimum price and only one bid were received and accepted, the public could question the possibility of backdoor maneuvering, despite the state's best intentions. Because there are only a few coal companies who have an interest here, if they were to talk amongst themselves and decide to share development costs and go in together with a single price, the net loser would be the people of Montana who got the lower bid. The Governor said that he would ask the DNRC to be creative as the process continues to ensure that the state gets top dollar for the lease.

Mr. Mason stated that the first step of that is to do what we have just done: an independent third party appraisal that looks at a detailed mine analysis in terms of what it would take to develop. Based on a 2006 property report prepared with GNP, DNRC knows a lot about the coal reserve & how it would be developed and how it would be mined. With the appraisal that we just finished, DNRC now knows how much it would cost to develop that. What DNRC is presenting today in terms of a third party appraisal indicates what that likely minimum value should be to in order to avoid leasing Otter Creek for less than what it should be leased for.

Governor Schweitzer stated that does not avoid the problem because as Ms. Lindeen pointed out in regard to land banking in Eastern Montana: with only one bidder, how can the DNRC be sure it is getting the maximum possible amount? The Governor stated that he would like to build a system so that the Land Board knows that it can get top dollar, as opposed to just the opinion of an appraiser setting a price and one bidder accepting that amount. He reiterated the need to be creative as the process moves forward.

Mr. Mason stated that in any bid process the Land Board reserves the right to reject any and all bids, so there is an option in terms of seeing what bids come in without committing to a bid. The board has full discretion in terms of the bid process.

Mr. Bullock referenced Mr. Mason's land banking access analogy . He said that according to the appraisal, DNRC's rate is lower than every other comparable out there (ranging from 11 cents to 90 cents). He asked about the assumption that the Tongue River Railroad will cost \$187 million.

Mr. Mason stated that that is the cost if the lessee finances a portion of the railroad. As stated earlier, DNRC's high number (ten cents per ton) assumes totally separate financing and construction of the railroad. There is no deduction for any financing costs at that ten cent number.

Mr. Bullock noted that the rate is still lower than all the other comparables out there.

Mr. Mason stated that Otter Creek is a brand new mine with a brand new infrastructure and brand new equipment. It is much more expensive at the outset to put in a brand new mine than extensions or expansions of existing mines with existing capital and existing infrastructure already there -- which is what most of those comparables are. Those do not have as high a capital cost as a brand new mine. In the case of Southern Powder River Basin, they have more productive mines than what even this would be.

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They use larger equipment and produce more coal per man hour. Some of their individual mines, produce more than everything we make in Montana in any given year. So in the Southern Powder River basin, there are higher bids on occasion.

Mr. Bullock asked if the initial billion dollar capital investment referenced in the appraisal analysis?

Mr. Mason stated that includes the railroad in terms of one billion dollars financing. If the whole cost of building the railroad were included, there would be a negative bonus. The number in the analysis was the financing cost where the operator bears some costs in terms of financing, but which is repaid over a period of years. That gives a much higher potential value than planning to bear the full cost, just on Otter Creek. That would not be realistic, because if Tongue River Railroad is built, there is only a portion of that is going to be used for Otter Creek, and so the most that a person at the mine level should have to look at is financing a part of it.

At the higher level, and again it is the access/no access argument. In the past, the Land Board has said has said that it will look at this in terms of the state not bearing this expense. The appraiser insists on going through that calculation in terms of bearing the financing costs for a portion of the railroad. Due to what the Land Board has said in the past, if the Tongue River Railroad is built, it will be separately financed and the \$187 million does not factor into the high number from the appraisal.

Mr. Bullock asked if the overall billion figured into the high and low numbers in the appraisal?

Mr. Mason stated that the billion dollars includes \$187 million in financing costs. The income model without financing would be \$820 million dollars instead on one billion.

Mr. Bullock stated that the July 17, 2006, Land Board minutes stated that the cost for starting this up is probably \$500 million with the railroad and \$253 million for the capital investment. He observed that the cost had nearly tripled in three years.

Mr. Mason stated that the costs keep going up.

Governor Schweitzer, referencing Mr. Bullock's point about GNP, where GNP and DNRC agreed to align interests because the tracts are joined at the hip with the checkerboard. However, GNP owns other sub-bituminous coal. They are currently mining in some places. In other places they are on the brink of mining. So their calculations that are not in a vacuum, that are comparing the value of developing this mine as opposed to developing another area that they have.

The state of Montana traded into the Otter Creek assets and did not acquire them because it decided to buy them. The Governor said that the state traded into the coal, but now the state is the trader here. He stressed the fact that the state trades land all of the time. There are a lot of ways of getting value from these assets and we have a requirement to maximize the value of these assets. The Governor said that as the board goes through this process, they should try determine in a way in a public manner to maximize our return on these assets—all possibilities should be looked at.

Beth Kaeding, Northern Plains Resource Council (NPRC) Chair, gave testimony against developing the Otter Creek coal tracts (*see Related Materials, Attachment 3*). NPRC requested that public hearings be held in Miles City and Lame Deer. Additionally, NPRC asked that the land board ensures that the entire range of issues be considered throughout this process.

Mike Scott, Sierra Club, gave testimony opposing the development of the Otter Creek coal tracts (*see Related Materials, Attachment 4*). The Sierra Club requested that a public meeting also be held in Missoula.

Alexis Bonogofsky, National Wildlife Federation (NWF), gave testimony opposing the development of the Otter Creek coal tracts (*see Related Materials, Attachment 5*). NWF joined NPRC and the Sierra Club in requesting public hearings be held across the state.

Steve Chestnut, Northern Cheyenne Tribe representative, gave testimony regarding the settlement agreement that was reached with the Land Board in 2002 (*see Related Materials, Attachment 6*). He was joined by the Tribal President, Executive Administrator, the head of the Tribal Environmental Protection Agency, as well as members of the Tribal Council who were in the audience.

He elaborated on the tribe's decades-long involvement with coal development, referenced the bitter experiences of the 1960s and 1970s. Mr. Chestnut stressed the exacerbation of negative environmental and financial impacts, as well as disregard for tribal concerns and interests. Mr. Chestnut stated that the tribe has been, and will remain, sincere and unwavering in their commitment to protecting tribal interests, as outlined in the settlement agreement, particularly in regards to employment considerations.

What the Northern Cheyenne Tribe wishes to impress upon the Land Board is that their expectation is that the obligations and commitments that were made in the settlement agreement will be honored. The agreement states that if the tribe's entitlements are realized, they will support Otter Creek development.

Governor Schweitzer stated that he welcomes and anticipates additional historical information and current input from the Northern Cheyenne Tribe regarding the settlement agreement and protection of tribal interests throughout the duration of the public comment period.

William Walksalong, Northern Cheyenne Tribe Executive Administrator and former President, stated that he was president during the time of New World Mine and other events referenced in tribal history regarding the land and development, leading to where we are today. At the time he was not invited to sit at the table to discuss any payments from the state or any kind of land exchange, so he crashed their party in a hotel east of town. President Clinton's representative was discussing New World Mine and the impacts to the Yellowstone ecosystem. Mr. Walksalong expressed the tribe's concerns to the group.

Mr. Walksalong also stated that he always tell the young people that the tribe's battle was with giants—giant corporations and giant governments. He said:

*One band of the Northern Cheyenne People surrendered—re-surrendered on Otter Creek, after we fled from Oklahoma. Chief Little Wolf surrendered—re-surrendered on Otter Creek. This is where he was willing to die for—bringing men and women and children back to this place. So he re-surrendered to General Miles at Otter Creek. That is why it so precious. People have bled. The same blood is in my veins today. It brought us back to north country. And I would say that that same blood, that same mindset, is still with us. We would bleed to protect our land. We have bled. We have sent people to Iraq and Afghanistan to hunt the terrorists that were terrorizing each one of your families. We will protect our land any way we can.*

Mr. Walksalong was sent to Washington D.C. by President Spang to express their concerns about the fulfillment of the Otter Creek settlement agreement to Senators Tester and Baucus and Congressman Rehberg. He also spoke to chief legal counsel for Senator Dorgan (North Dakota) and the Senate Committee on Indian Affairs. To try to lay the groundwork, the tribe is trying to talk to people who listen and feel obligations in the settlement.

Mr. Walksalong reiterated the tribe's commitment to protect their land. He spoke of the Fort Laramie Treaty (1868) where the tribe surrendered 27 million acres for a few million \$4 or \$5 million dollars. The government took all the costs out of there, even the cost of burying the Northern Cheyenne people. He said that his people may sound like complainers, but they are not complainers—they are survivors. They realize the financial and the legal detail that are put before us in this modern era.

Mr. Walksalong spoke of wanting to hold the people who made those agreements about Otter Creek to those agreements. His hope is to be able to tell his people there is mining, there is the Tongue River railroad, and that the tribe did their best and left this legacy. He requested that if the Otter Creek process does move forward, that a hearing be held in Lame Deer so that the Northern Cheyenne can come and speak.

Todd O'Hare, Rio-Tinto Energy of America, stated that Rio-Tinto Energy of America is the third largest coal producer in the United States, and the second largest coal producer in the Powder River Basin. This includes Spring Creek, which is the largest coal producing mine in Montana. Rio-Tinto is neither an opponent nor a proponent of the Otter Creek tracts, but invited the Land Board to tour the Spring Creek mine in order to better understand the scope, size, and capital required to open a coal mine and keep it operating.

Ann Hedges, MEIC, stated that, unlike old growth, the coal in these tracts is not in peril of disappearing. She reminded the Land Board that there is no need to act immediately, and that they have the opportunity to take a larger view of how to best manage this resource for the benefit of this and future generations. Ms. Hedges stated that the future of coal is uncertain, rendering the value of the resource as uncertain. She spoke in regards to carbon sequestration, noting the ongoing discussions of the topic in the current legislative session, as well as President Obama's statement that there will be a plan for carbon sequestration by 2011. Ms. Hedges advised the land board to wait until there is more regulatory certainty before leasing the coal.

Ms. McCulloch spoke in regards to the settlement agreement made with the Northern Cheyenne Tribe. She referenced her motion from the February 19, 2002, Land Board meeting (*see Related Materials, Attachment 7*). A two-day meeting had been held in December 2001 with Land Board members, GNP, and the Northern Cheyenne in order to negotiate the terms of the agreement. Some of the basic parts of the agreement are:

- ♦ to ensure that if there is development of the Otter Creek tracts, whether owned by the state or GNP, the people living in that area would prosper economically.
- ♦ employment opportunities be made available local residents;
- ♦ utilization of the local work force (i.e. truckers, local business, etc) for the many different steps inclusive to the process; and
- ♦ that the program protects the Northern Cheyenne historical, cultural, religious, and burial practices and traditions.

She stated also that there are many other issues that need to be worked out as the discussions and development process continues.

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Ms. Lindeen moved that that because Otter Creek is such a large issue that has been going on for such a long time, the public comment period should be extended to 60 days. She also said that it is important to hold a meetings for public comment in Eastern Montana—Miles City and Lame Deer. She said that it is incredibly important the to give those in Eastern Montana the ability to comment without having to come to Helena.

Mr. Bullock made the addendum to the motion that there be a status update at the next Land Board meeting. He stressed that the purpose would not be to take testimony, but to explore whether 60-days is a sufficient comment period.

Governor Schweitzer agreed that the comment period should be at least 60 days—maybe even longer.

Ms. McCulloch seconded the amended motion.

**Motion carried unanimously.**

**Motion to adjourn made by Ms. Lindeen. Seconded by Mr. Bullock. Carried unanimously.**



**Testimony before the Montana Land Board on Solicitation of Public Comment for  
the Appraisal of the Otter Creek Coal Tracts**  
by Beth Kaeding, Chair, Northern Plains Resource Council  
April 20, 2009

Governor Schweitzer and members of the Land Board: My name is Beth Kaeding, and I am the Chair of Northern Plains Resource Council. Thank you for this opportunity to speak today.

It was 11 months ago that I stood before the previous Land Board to testify against the initiation of this appraisal process for the Otter Creek coal tracts (comments attached). Northern Plains' position then—and it remains our position today—is that the multitude of environmental, social, and fiscal problems associated with leasing these coal tracts should cause the State to step back and consider that the costs of mining this coal may far exceed the anticipated monies that might be generated.

Nevertheless, the Land Board approved the initiation of the appraisal process, and we are here today to determine whether or not the completed appraisal should be submitted to the public for review and comment. Throughout its 37 year history, Northern Plains has strongly advocated for public participation in government decisions, so we are not going to oppose this step in the process. In fact, we encourage it.

However, we ask that the Land Board recognize that this is a complicated and highly contentious proposal. Thus, we respectfully request that **the public comment period on the appraisal be extended to a minimum of 60 days**. Additionally, Helena is a long way from southeastern Montana, and it is difficult for the farmers and ranchers and tribal members who live in that region of our state to get here to participate in this important decision. Because this project could significantly impact those Montanans' lives and livelihoods, we also respectfully request that the Land Board **hold the meeting to accept public comment in Miles City and, if it can be arranged, an additional meeting in Lame Deer**.

We also want to ask the Land Board to consider the fact that this appraisal of the value of the coal is only one piece of the complicated proposal. As we understand the process, at the end of the public comment period, the Land Board will decide whether or not to lease the coal. How can this be a valid process when any environmental analysis of the project will not yet have been done?

The risks and costs of this project are enormous and broad-ranging. To name just a few:

- the actual physical impacts to surface and water resources
- the impact and possible permanent impairment of the alluvial Otter Creek valley
- the cost of reclaiming the area after mining—we have concerns that the high clay content of the soil as well as the steep terrain would make reclamation impossible in many areas

- the costs that the 2002 Northern Cheyenne Agreement so justifiably add to this project
- the impact to the Class I air quality of the Northern Cheyenne lands
- the lack of any actual transportation for this coal—as you know, Northern Plains has opposed the Tongue River Railroad for 30 years and we will continue to oppose its construction and all the environmental and social and agricultural economic damage that project would cause
- the fact that the current federal administration is actively working to curb greenhouse gas emissions—coal-fired generation plants are a significant contributor to these emission; just last week the Environmental Protection Agency declared that greenhouse gas emissions must be regulated
- and the fact that while it is true that coal will continue to be used by this country for a time, the fact is that coal is slowly being phased out; during the past two years, on average, nearly 3 planned coal plants were canceled every month and only 5 new plants or plant expansions went online in 2008. Half the coal plants in the country are more than 44 years old, reaching the end of their useful life, and they are not being replaced.
- finally, the significant cumulative effects this project would have on a region already facing coal bed methane development must be seriously considered.

Northern Plains, therefore, also requests that the Land Board **ensure that the entire range of issues and costs as well as any benefits of the project be carefully analyzed and examined BEFORE any lease is offered.** It is not feasible to believe that you can pre-determine all the necessary stipulations such a lease might need in order to protect Montana's resources, its people, and its other economies without doing the necessary environmental analysis prior to leasing.

Thank you for your attention and for consideration of our comments.



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Members of the Land Board, I am Mike Scott, Associate Regional Representative for the Sierra Club. I am submitting comments on behalf of the Sierra Club in Montana in regard to public comment on the Otter Creek Coal Tracts. The Sierra Club represents over 2300 people in Montana and 1 million nationally. We are greatly concerned with the development of the Otter Creek Coal Tracts. Coal is a 19<sup>th</sup> century solution to a 21<sup>st</sup> century problem, and the time has come to start moving away from this polluting source of energy.

We ask that the Land Board, when considering the development of Otter Creek, open the process to significant public comment so that Montanans have the ability to weigh in on this important subject. We feel that without at least a 60 day comment period, along with public meetings in Lame Deer, Ashland, and Miles City, the Land Board will not receive adequate direction from the citizens of Montana. These communities will be heavily impacted by the development of this coal and are far from Helena. Many in the impacted region lack the economic means to drive to Helena for a Land Board meeting. We also feel that holding public meetings in Lame Deer and Ashland will give the people of the Northern Cheyenne Nation the opportunity to give their thoughts on the issue. The Northern Cheyenne, as a sovereign nation, deserve this consideration.

Furthermore, we ask that a public meeting be held in Missoula as well, in order to give western Montanans the opportunity to speak to the Land Board about the further development of and reliance on coal. Though they are not in the area of development, western Montanans are impacted by climate change as a result of coal emissions and have a right to be heard on this subject.

We also ask that the Land Board, before deciding whether or not to lease this coal, consider the full environmental cost to the state by completing an environmental analysis. The economic assessment of the coal is one piece of a very complicated puzzle. It is our understanding that the Land Board will be ready to decide on leasing the coal at the end of the comment period, which seems incomplete to the Sierra Club. Without analyzing the full environmental cost of the project, there is no way that we can know if this is a good or bad deal for the state. Therefore, this should be factored into the decision making process before the coal is leased, not after.

We thank you for your time and consideration.

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National Wildlife Federation, Tribal Lands Conservation Program, 2020 Tired Man Road, Billings, MT 59101

Members of the Land Board, my name is Alexis Bonogofsky, Tribal Lands Coordinator for the National Wildlife Federation (NWF) Billings, MT. I am submitting comments on behalf of NWF's members in Montana in regard to public comment on the Otter Creek Coal Tracts. NWF represents over 5,000 people in Montana and four million nationally.

NWF recommends that the State Land Board take the following steps when considering the development of the Otter Creek coal tracts.

- Institute a 60-day public comment period, at minimum.
- Hold public meetings in Lame Deer, Ashland and Miles City. Public meetings in these communities are necessary for the state to fully understand the effect that the development of this coal would have in southeastern Montana. Public meetings in Helena are not sufficient since many citizens who will want to submit public oral comments cannot make the trip to Helena due to job constraints or economic constraints. Meetings in Lame Deer and Ashland are necessary to give the Northern Cheyenne tribal citizens the opportunity to voice their opinions on the leasing of Otter Creek. As you know, the tribal council, just like any elected governmental body, does not speak for all of its citizens and the land board should not assume this to be the case. Meetings must be held on evenings and weekends and not during the day.
- Hold a public meeting in Missoula to give western Montanans the opportunity to give their comments. Though they are not in the area of development, western Montana will be greatly impacted by climate change.
- Complete an environmental impact statement before making a final decision on whether or not to lease this coal. In the economic analysis of the Otter Creek coal, the environmental costs were not taken into consideration. This is the equivalent of looking at the only the income and not the expenses. In addition, the economic analysis was based on figures from 2008 and not reflective of our current economic crises.

The need for a thorough public commenting process is extremely important for two reasons. As you already aware, on April 17<sup>th</sup>, the EPA announced its finding that global warming pollution constitutes a threat to public health and welfare under the Clean Air Act. The announcement signals that EPA will take action to limit greenhouse gas emissions. The State of Montana would be better served to develop renewable energy on school trust land and develop a tax mechanism that would give the state the same amount of revenues generated from carbon fuels.

Thank you for your time and consideration of NWF's recommendations.

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Northern Cheyenne Tribe Statement  
at 4-20-09 Land Board Meeting  
Otter Creek  
Question 1 - Settlement Agreement

Introduction. <sup>Our</sup> My question is aimed at making sure that the obligations of the State Land Board under the February 19, 2002 Settlement Agreement with the Northern Cheyenne Tribe are fully recognized and performed. But first, some background information is necessary.

The Northern Cheyenne People are deeply dedicated to their Reservation and culture. Since the early 1970s, a succession of proposed coal-related development projects on and in the vicinity of the Reservation have threatened these Northern Cheyenne interests and have prompted the Northern Cheyenne to repeatedly act creatively, valiantly, and with success, to deal with these threats. With minimal resources, the Tribe did so in proceedings before the Secretary of the Interior, the Congress, the federal courts at all levels including the U.S. Supreme Court, and the Montana Supreme Court.

The problems initially arose during the period 1966 – 1971, when about 60% of the Reservation was essentially turned over to a collection of the Nation's largest energy companies and some Billings, Montana land speculators for coal development, on unconscionable terms (massive acreages, royalties ranging from 15 cents to 17.5 cents per ton, and little or no environmental analysis or planning). The Tribe was led into those transactions by the Bureau of Indian Affairs and USGS. The Tribe was poorly advised and unrepresented. These transactions were ultimately canceled by Act of Congress, through a negotiated legislative solution which the Tribe took the lead in fashioning, negotiating and obtaining.

In subsequent years, the Tribe was repeatedly confronted with off-Reservation coal-related development projects, formulated without giving any real consideration to: the demands the projects would impose on Reservation public services and facilities; the profound deficits that already existed in Reservation public services and facilities; the Tribe's abject lack of resources to address these impacts; and the historic exclusion of Northern Cheyenne from employment in such off-Reservation projects, notwithstanding the profoundly depressed economic conditions which prevailed, and still prevail, on the Reservation both in absolute terms and in comparison to the Tribe's off-Reservation neighbors. These off-Reservation projects (like the Otter Creek project under consideration here) would generate extraordinarily large revenues for State and local government in the form of a share of coal lease bonuses, rents and royalties, and a variety of State and local taxes, little or none of which would find its way to Tribal government.

On a case-by-case basis, the Tribe took the initiative to deal with these issues. Thus, after gaining a degree of legal standing with respect to some of these projects (e.g., the Colstrip powerplants and the Rosebud Mine), the Tribe negotiated employment agreements with the project operators and the result has been some employment opportunity for Northern Cheyennes in those projects. Without that legal standing, and the negotiated agreements, the historical pattern of broad exclusion of Northern Cheyenne from

employment in off-Reservation projects (notwithstanding the harsh economic conditions that prevail on the Reservation) would have continued unabated.

The Otter Creek tracts, at their closest point, are approximately four miles from the Northern Cheyenne Reservation. For the reasons I have outlined, the Tribe was opposed to the transfer of the tracts by the federal government to the State. It expressed that opposition early-on. In the Tribe's view, transferring the tracts to the State for coal leasing would strip the Tribe of legal protections, previously established in the courts by the Northern Cheyenne under the federal coal leasing system and the federal trust responsibility to the Tribe.

When it appeared that the Otter Creek transfer would finally go forward, the Tribe, on its own, fashioned a strategy aimed at negotiating terms which would facilitate the transfer. On the Tribe's initiative, for over a year, extensive meetings, discussions and negotiations were conducted with all of the decisionmakers - - the Secretary of the Interior, the Montana Congressional delegation, other members of Congress, Governor Martz, Lieutenant Governor Ohs, and the State Attorney General, Superintendent of Public Instruction, Secretary of State, and State Auditor, as well as Great Northern Properties ("GNP").

At the outset of that effort, the Tribe sought and obtained a commitment from the Secretary of the Interior that the Otter Creek transfer would be held in abeyance to enable the Tribe's effort to achieve a negotiated solution, since if the transfer was made before that effort was completed the Tribe would be unable to thereafter challenge the transfer (because of federal sovereign immunity). During this stand-still period, considerable progress was made: agreements in principle were reached with the Governor (which was later repudiated by her); with the Montana Congressional delegation, which committed to pursue federal legislation to provide federal impact funding to the Tribe and facilitate an exchange of GNP's on-Reservation coal holdings for off-Reservation federal coal; and with GNP with respect to the exchange of its on-Reservation coal. While all that was going on, I understand that others in Billings were working behind the scenes with the Governor's office to undermine Tribe's efforts.

Very late in the game, and on the eve of the successful drafting and signing of the February 19, 2002 Settlement Agreement between the Tribe and the Land Board, the Tribe received a confidential tip from a knowledgeable Washington, D.C. party that, notwithstanding the stand-sill agreement, between her and the Tribe, the Secretary of the Interior was about to transfer the Otter Creek tracts to the State, without any prior notice to the Tribe. Because such a transfer would wipe-out the Tribe's ability to resolve matters by agreement, the Tribe had no choice but to file suit against the Secretary to enjoin the transfer on multiple federal legal grounds. That suit was filed in Washington, D.C. two business days after the Tribe received the tip about the impending transfer.

After Governor Martz repudiated her oral agreement with the Tribe (a repudiation for which the Lieutenant Governor Ohs, who was a major player in the negotiations, later



apologized to the Tribe), the Tribe went directly to the State Land Board to formalize and consummate the negotiated Settlement Agreement. The Land Board thereafter approved and entered into the Settlement Agreement. Thereafter, in accordance with its commitments under the Settlement Agreement, the Tribe released any and all claims that the transfer of the Otter Creek tracts to the State was unlawful and promptly dismissed its lawsuit with prejudice.

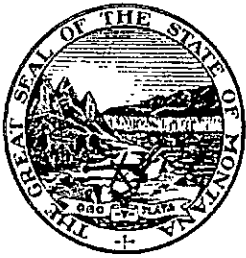
The Tribe has fully honored its obligations under the Settlement Agreement and there is no question in my mind that the Land Board must do likewise. I understand that the Tribe is working closely with GNP to consummate the exchange of GNP's on-Reservation coal contemplated by the Settlement Agreement, in accordance with the Tribe – GNP Agreement and the federal legislation to be enacted.

We  
I also understand the Montana Congressional delegation remains committed to pursuing enactment of the federal legislation providing federal impact funding to the Tribe and facilitating the GNP exchange. In the Settlement Agreement, the State Land Board committed to support the enactment of such legislation.

The Land Board also committed in the Agreement: to support improvement by the State of certain off-Reservation roads, in order to provide off-Reservation options for truck and other traffic that would be engendered by Otter Creek traffic; and to support efforts to enable the Tribe to better address law enforcement vacuums on the Reservation with respect to non-Indians.

The Land Board further committed in the Settlement Agreement that, when it authorizes leasing of the Otter Creek tracts or State surface lands in the area for coal-related facilities, it will direct DNRC to require each project operator under such a lease, in close consultation with the Tribe, to develop and submit for approval of the Land Board certain "Operating Plans" providing for:

- a program for employment in project operations of Indians and other local residents who reside within 50 road miles of project operations;
- a program for contracting opportunities for businesses owned or controlled by the Tribe or its members, in project operations;
- a program to encourage project work force and truckers to observe, when on the Reservation, the same standards of conduct generally applicable to Northern Cheyenne on the Reservation;
- an environmental monitoring program to protect the Reservation environment; and
- a program to protect Northern Cheyenne historical, cultural, religious and burial practices and traditions.



## Montana Office of Public Instruction

Linda McCulloch  
State Superintendent

### Otter Creek Motion At the February 19, 2002 Land Board: State Superintendent Linda McCulloch

I move the Board adopt the "February 19, 2002" version of the Otter Creek Settlement. You should all have a copy of it before you and I have made additional copies for the audience. This is the version of the agreement, which you received on Friday afternoon, February 15, with minor edits on pages C-1 & 2 to make the agreement conform to the changes made in the February 15 draft.

This version has several important revisions from the one included in your packet as a result of ongoing discussions among the members of the Land Board, coal developers, the Northern Cheyenne Tribe, and the Governor's office. These revisions have been circulated among interests involved in the modification of this document since the last January Land Board meeting.

Those changes include Secretary of State Bob Brown's suggestions to remove the exploration phase of the project from the terms of the agreement, clarification on how the agreement may be modified, and changes in language to set a more positive tone.

The other significant change involves the removal of lease stipulations from the agreement. This was done to meet the concerns of coal developers that such stipulations may unnecessarily encumber the leases. The five mitigation measures outlined in Exhibit B will now be met through the operating plans to be written by the project operator in consultation with the Northern Cheyenne Tribe.

I make this motion to comply with the Land Board's trust duties and responsibilities outlined in the Montana Constitution and state statutes to "administer this trust to secure the largest measure of legitimate and reasonable advantage to the state." (Montana Code Annotated 77-1-202).

By adopting this motion, the Board will be removing a significant legal barrier to the transfer of 14 federal coal tracts to the state of Montana. Controversy surrounding this transfer has gone on since 1998. Resolving this issue today will result in the transfer of estimated 533 million tons of federal coal to the state of Montana.

Without an agreement, the transfer will continue to lie in "legal limbo" with no development and more years of delay while the issue works its way through the court system. Resolving the issue today means potentially millions of dollars for Montana's K-12 schools and university system, good paying jobs for Montanans, and much needed development for some of our state's most economically depressed communities.

(over)

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I appreciate the concerns raised by the Governor in her letter to further delay a Board decision on this issue. However, I must respectfully disagree.

As a former resident of Ashland, I am intimately familiar with the complexities that have arisen surrounding potential coal development in the Otter Creek area. At the 2001 Legislature, I placed my office squarely in favor of legislation to facilitate the transfer of the federal Otter Creek coal tracts to the state of Montana.

As we all know, the agreement before us today has undergone many changes since it was first outlined in meetings between the Northern Cheyenne Tribe and the Governor's office in the Spring of 2001. In August of 2001, the Tribe refined their concerns into a draft proposal sent to the governor's office.

On December 10 & 11, at the request of the Governor, a two-day meeting was convened in order to resolve issues surrounding the Otter Creek transfer. The meeting was chaired by Lt. Governor Ohs and involved representatives from the Northern Cheyenne Tribe, Montana's Congressional Delegation, members of the State Land Board, and Montana state agencies.

Good progress was made. Tribal representatives agreed to numerous changes that sought to address concerns of the state and the coal industry. At the December 17<sup>th</sup> public meeting of the Land Board, an informational presentation was made to the Board and the public concerning the proposed agreement.

At the urging of the Governor's office the proposed agreement was placed for public hearing at the January 22 Land Board meeting. In a January 7<sup>th</sup> letter, the Governor outlined further concerns she had with the proposed agreement. The proposed agreement was subsequently removed from the January agenda and rescheduled for today's meeting.

Throughout January and February the Northern Cheyennes have continued to negotiate in good faith to accommodate concerns raised by the governor, state land board members, and industry representatives. Drafts of these proposals have been circulated to parties involved, available through the Department of Natural Resources and Land Board member offices, and reported in the Montana press.

No fewer than 12 attorneys from the offices of the Governor, the Attorney General, the State Auditor, the Secretary of State, Montana's Congressional delegation, the Northern Cheyenne Tribe, and coal development interests have reviewed and revised the agreement before us today.

The time to act is today. This agreement will increase the state school trust's value by millions of dollars by moving forward the transfer of the federal Otter Creek tracts to the State of Montana. It is an agreement that builds a partnership among state government, local communities, the Northern Cheyenne Tribe, the congressional delegation, and coal development companies to maximize the benefits of the development of these coal resources.

I look forward to the comments we are about to receive at this public hearing.